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"DUDE, WHERE'S MY CAR?" A LOOK AT HOW THE SEVENTH CIRCUIT ADDRESSES CHICAGO'S VEHICLE IMMOBILIZATION PRACTICES THAT DRIVE ITS RESIDENTS INTO BANKRUPTCY

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INTRODUCTION

Chicago has been subject to much criticism over its aggressive vehicle impoundment program and excessive fines for traffic violations outlined in title 9 of its Municipal Code.[1] Upon receiving

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1 Municipal Code of Chicago, tit. 9, ch. 4–124 (1990) (hereinafter "M.C.C.") (available at: "http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il"). The stated purpose of Chicago's traffic enforcement policy is to "provide for the administrative adjudication of violations of ordinances defining compliance, automated speed enforcement system, and automated traffic law enforcement system violations and regulating vehicular standing and parking within the city." *Id.* at § 9-100-010.

notice of a traffic violation, an individual has seven days to either admit liability by paying the fine or request a hearing to contest the violation.[2] The failure to respond results in the "entry of a determination of liability against such individual[,]" with such determination constituting "a debt due and owing the [C]ity."[3] If a vehicle owner has two or more determinations of liability, the City can impound his vehicle.[4] Further, the City adds additional fines for each day the vehicle remains immobilized until the owner redeems by paying the traffic fine debt in full, in addition to the fees associated with towing and storage, and reimbursing the city for its efforts to collect on the outstanding debt.[5]

In order to address this spiral of scofflaw debt, thousands of Chicagoans each year file for Chapter 13 bankruptcy relief. These debtors do not necessarily seek to discharge this debt, but rather intend to file a plan to pay off their debts to all of their creditors over a period of time. In doing so, the City immediately becomes obliged to turn over their cars pursuant to *Thompson v. General Motors Acceptance Corp.*,[6] where the Seventh Circuit held that the automatic stay protection in the Bankruptcy Code[7] works to return seized property back to the debtor.[8]

In recent years, more circuits have joined in the issue, each grappling with the language of section 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[9] Though

[2] *Id.* at § 9–100–050
[3] *Id.*
[4] *Id.* at §9–100–120.
[5] *Id.* at § 9–92–080(a)-(b).
[6] 566 F.3d 699 (7th Cir. 2009).
[7] 11 U.S.C. § 362(a) (2012).
[8] *Thompson*, 566 F.3d at 711.
[9] 11 U.S.C. § 362(a)(3).

the automatic stay is unquestionably broad,[10] the circuits are split as to whether this provision also prohibits retaining possession of property seized by a creditor before the bankruptcy filing.[11]

In 2016, Chicago tried to scheme around the Seventh Circuit's decision when it codified an ordinance granting the city a possessory lien in every car impounds on account of outstanding traffic debt.[12] Now armed with the rights of a secured creditor,[13] the City openly violated *Thompson* and began to refuse to turnover its immobilized vehicles upon bankruptcy filings.

In 2019, *In re Fulton*[14] afforded the Seventh Circuit the opportunity to review the automatic stay in light of a growing circuit split on the issue and a building tension in the bankruptcy courts between Chicago and its constituents.[15] There, the court relied on precedent and the policy interests of the Bankruptcy Code to reiterate that section 362(a)(3) commands the City to return immobilized vehicles in its possession once their owners file for bankruptcy, even if the City claims a possessory lien on them.[16]

This Note's purpose is to analyze the automatic stay provision in bankruptcy, giving insight into its statutory framework, purpose, and effects, before ultimately concluding that the Seventh Circuit correctly

[10] 11 U.S.C. § 362(a)(1)-(8).

[11] *Compare* Weber v. SEFCU (*In re Weber*), 719 F.3d 72, 81 (2d. Cir. 2013), *Thompson*, 566 F.3d at 711, Cal. Emp't Dev. Dept. v. Taxel (*In re Del Mission Ltd.*), 98 F.3d 1147, 1151 (9th Cir. 1996), Knaus v. Concordia Lumber Co. (*In re Knaus*), 889 F.2d 773, 775 (8th Cir. 1989) *with* In re Denby–Peterson, 941 F.3d 115, 119 (3d Cir. 2019), In re Cowen, 849 F.3d 943, 949 (10th Cir. 2017) *and* United States v. Inslaw, 932 F.2d 1467, 1474 (D.C. Cir. 1991).

[12] M.C.C., *supra* note 1, at § 9-92-080.

[13] *See infra* notes 17–26 and the accompanying text therein.

[14] 926 F.3d 916 (7th Cir. 2019).

[15] *See, e.g.*, In re Steenes, 918 F.3d 554, 556 (7th Cir. 2019) (the City accusing debtors of using bankruptcy as a sword to thwart traffic laws).

[16] *Fulton*, 926 F.3d at 921–23.

decided *Fulton*. This Note will first give a brief introduction to bankruptcy law and security interests necessary to understand the issues presented by the automatic stay and chapter 13 bankruptcy relief. Second, this Note will address the automatic stay in detail before surveying the approaches taken in the developing split on the section 362(a)(3) issue. Third, this Note will discuss *Fulton* while emphasizing differences in the Seventh Circuit's approach in light of recent decisions by other circuits. Last, in light of the Supreme Court granting certiorari,[17] this Note will assert that the Seventh Circuit correctly decided *Fulton* and offer other justification in support.

BACKGROUND

Bankruptcy is a system of federal law governed entirely under the Bankruptcy Code.[18] Though not a requirement,[19] an individual will commonly declare bankruptcy once he becomes insolvent, or when his debts exceed the sum of his assets.[20] The process begins by the filing of a petition for relief, upon which the debtor provides notice to all creditors of the bankruptcy.[21] Then, in order to be repaid, creditors of

[17] In re Fulton, 926 F.3d 916 (7th Cir. 2019), *cert. granted sub nom.*, City of Chicago, Illinois v. Fulton, 140 S. Ct. 680 (U.S. Dec. 18, 2019) (No. 19-357).

[18] Article One of the United States Constitution empowers Congress "to establish . . . uniform [l]aws on the subject of Bankruptcies throughout the United States." U.S. CONST. art I, § 8, cl. 4. The current bankruptcy laws are outlined in Title 11 of the United States Code. 11 U.S.C. §§ 101–1532 (2012) (the "Bankruptcy Code" or the "Code"). All section numbers referenced in this Comment and accompanying notes herein refer to the Bankruptcy Code unless otherwise specified.

[19] Insolvency is only a prerequisite for municipalities seeking to file for chapter 9 relief. Individual debtors seeking to file for relief under chapters 7, 11, or 13 do not have to be insolvent at the time of filing. *Compare* 11 U.S.C. § 109(c)(3) (requires municipalities to be insolvent to be eligible for chapter 9 relief) *with* 11 U.S.C. § 109(b) (prerequisites to file for chapter 7 relief); 11 U.S.C. § 109(d) (prerequisites to file for chapter 11 relief); *and* 11 U.S.C. § 109(e) (prerequisites to file for chapter 13 relief).

[20] *See* 11 U.S.C. § 101(32)(A) (defining insolvency).

[21] 11 § U.S.C. 109.

the debtor must appear and file a proofs of claim in the amount of the debt owed to them.[22]

Under the Bankruptcy Code, a claim represents a right to payment the creditor has against the debtor.[23] An important distinction is whether the claim is secured or unsecured, which in turn relies on the remedies available to the creditor upon default.[24] Unsecured claims are rights to payment against the debtor that are not secured by collateral.[25] Conversely, secured creditors possess some sort of security in the debtor's property that allows it a remedy to collect on the collateral.[26] Secured claims arise from liens, which are defined under the Bankruptcy Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation."[27]

Further, a lien can be either consensual or nonconsensual, depending on if such lien arises upon consent of the debtor pursuant to a security agreement.[28] Nonconsensual liens, like Chicago's immobilization ordinance, are generally created two ways, either by statute, or by judgment. The former is considered a statutory lien, which is defined under the Bankruptcy Code as a "lien arising solely by force of a statute on specified circumstances or conditions . . ."[29]

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[22] 11 § U.S.C. 501(a).

[23] 11 § U.S.C. 101(5). A claim also includes the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . . ." *Id.*

[24] *See generally* BANKR. JUDGES DIV., ADMIN OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY BASICS, 21 at n.7 (Nov. 2011) (discussing secured claims and unsecured claims) (hereinafter "BANKRUPTCY BASICS") (available at http://www.uscourts.gov/sites/default/files/bankbasics–post10172005.pdf). Those possessing an unsecured claim are considered "unsecured creditors" while those possessing a secured claim are "secured creditors."

[25] *See generally id.*

[26] *See generally id*.

[27] 11 U.S.C. § 101(37).

[28] 11 U.S.C. § 101(51) (defining the term "security interest" to indicate "a lien created by agreement.").

[29] 11 U.S.C. § 101(53).

The latter is a judicial lien, which is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."[30]

Once the claims are filed, the bankruptcy operates consistent with equitable principles in the furtherance of one goal—to round up the debtor's assets and debts and distribute such assets in account of such debts in an orderly fashion.[31] Within the Bankruptcy Code are three important concepts that act to further this goal—(1) the bankruptcy estate; (2) turnover; and (3) adequate protection.

A. Property of the Estate: Section 541(a)

Once a bankruptcy petition is filed, a bankruptcy estate[32] is created under section 541(a).[33] The estate is unquestionably broad in scope, as it consists of the "legal or equitable interests of the debtor."[34]

The importance of the bankruptcy estate is best understood by examining the differences amongst the available types of bankruptcy

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[30] 11 U.S.C. § 101(36).

[31] *See, e.g.*, In re Glenn, 542 B.R. 833, 841 (Bankr. N.D. Ill. 2016) ("Above all, bankruptcy is a collective process, designed to gather together the assets and debts of the debtor and to effect an equitable distribution of those assets on account of the debts. The more participation there is; the better this process works.") (referencing Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1194 (7th Cir. 1989)).

[32] The "estate" and "bankruptcy estate" are used interchangeably herein.

[33] 11 U.S.C. § 541(a).

[34] *Id.*; *see also* Matter of Carousel Intern. Corp., 89 F.3d 359, 362 (7th Cir. 1996) ("[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541."). The Bankruptcy Code is the overriding authority to determine the extent of property of the estate. Bd. of Trade of City of Chi. v. Johnson, 264 U.S. 1, 11 (1924); *c.f.* In re Barnes, 276 F.3d 927, 928 (7th Cir. 2002) (holding that the debtor's liquor license was property of the estate despite the license not being considered property under Indiana law, where the debtor filed for relief). Property rights, on the other hand, are determined by state law. Butner v. United States, 440 U.S. 48, 55 (1979).

relief. In chapter 7 cases, or "liquidation" proceedings, a bankruptcy trustee is appointed in order to liquidate non–exempt[35] property of the estate.[36] The proceeds of the liquidation are then distributed to the unsecured creditors.[37] After the estate property has been liquidated, the bankruptcy case closes, and the debtor is granted a discharge of his outstanding debts.[38]

Relief under Chapters 11 and 13, on the other hand, focus on reorganizing the debtor's affairs to address his debts.[39] Chapter 11 is commonly utilized by business entities, while Chapter 13 is commonly used by individual debtors.[40] Notwithstanding the preceding, the premises of chapter 11 and chapter 13 are largely similar—the debtor formulates a plan to use discretionary post-petition income to repay creditors over a certain period time.[41]

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[35] The Code authorizes individual debtors to claim exemptions on certain kinds of property in order to spare it from the liquidation process. *See* 11 U.S.C. § 522. Common examples include homestead exemptions under 11 U.S.C. § 522(d)(1), an exemption for household goods under 11 U.S.C. § 522(d)(3), and an exemption for certain employment benefits under 11 U.S.C. § 522(d)(10).

[36] *See* BANKRUPTCY BASICS, *supra* note 15, at 7.

[37] *Id.* (stating that chapter 13 "is designed for an individual debtor with a regular source of income . . . [while chapter 11] ordinarily is used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court–approved plan of reorganization.")

[38] *Id.*

[39] *Id.* at 7. Debtors under chapter 11 and chapter 13 retain their property and utilize income earned after the bankruptcy petition ("postpetition") to pay their debts that accumulated before the bankruptcy filing ("prepetition"). *Id.*

[40] *Id.* at 8.

[41] *Id.*; *see also* 11 U.S.C. § 1321 (chapter 13 debtors "must file a plan."). The requisite length of the plan generally depends on the income of the debtor. If the debtor's annual income is greater than the median income of the state in which he filed, the plan cannot exceed five years. *See* 11 U.S.C. § 1322(d)(1). If the debtor's income is greater than that state's median income, the plan cannot exceed three years unless the court, for cause, orders otherwise. *See* 11 U.S.C. § 1322(d)(2).

In furtherance of an individual reorganization, Chapter 13 permits debtors to retain possession of property of the estate.[42] This applies to property of the estate encumbered by security interests, including mortgages and liens.[43] However, in order for the plan to be approved by the court, the debtor must treat the secured claims in the plan by either (1) obtaining the secured creditors' consent to the plan; (2) proposing to pay the full amount of the secured claim and provide, if applicable, "adequate protection" payments for the interests of the secured creditor (commonly referred as "cramdown"); or (3) surrendering the collateral to the secured creditor.[44]

B. Turnover: Section 542(a)

At the outset of the bankruptcy case, there are times where someone other than the debtor maybe be in possession of property of the estate. Further compounding this issue is when the repossessed asset would be of beneficial use to the bankruptcy estate. The Bankruptcy Code addresses these situations in section 542, which provides:

> [A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease . . . *shall deliver* to the trustee, and account for,

[42] *See* 11 U.S.C. § 1306(b); *see also* 11 U.S.C. § 1115(b) (recognizing the same in chapter 11).

[43] *See* BANKRUPTCY BASICS, *supra* note 15, at 22 (stating that "chapter 13 allows individuals to reschedule secured debts . . . and extend them over the life of the chapter 13 plan."); *see also* 11 U.S.C. § 1306(b) ("By filing under this chapter, individuals can stop foreclosure proceedings and may cure delinquent mortgage payments over time.").

[44] 11 U.S.C. § 1325(a)(5). Section 1325 outlines the requirements for a court to confirm a chapter 13 bankruptcy plan. 11 U.S.C. § 1325. If a plan cannot be confirmed in a reasonable amount of time, a court may dismiss the bankruptcy case. *See* 11 U.S.C. § 1307(c)(5).

> such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.[45]

In essence, section 542 authorizes the "turnover" of estate property held by parties other than the debtor.[46] If turnover is a contested matter, meaning there is a dispute over the legal or equitable interests of the property at issue, a turnover action must be brought under an adversary proceeding, which is a lawsuit separate from, but related to, the underlying bankruptcy case.[47] Turnover can be incredibly important when the repossessed asset would be of beneficial use to the bankruptcy estate.

C. Adequate Protection: Sections 363(e) and 361

Though undefined in the Bankruptcy Code, the basic function of adequate protection is to protect the secured creditor's interest in collateral during the pendency of the bankruptcy, especially upon the risk of its interest in collateral decreasing.[48] A good example of this

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[45] 11 U.S.C. § 542(a) (emphasis added).

[46] *See id.* Section 542 may be referred herein as the "turnover provision."

[47] *See generally* BANKRUPTCY BASICS, *supra* note 15, at 37. Adversary proceedings are governed under Rule 7001 of the Federal Rules of Bankruptcy Procedure. FED. R. BANKR. P. 7001. A turnover action is generally brought under an adversary proceeding because it is a "proceeding to recover money or property . . . ." FED. R. BANKR. P. 7001(d); *but see* United States v. Whiting Pools, Inc., 462 U.S. 198, 211 (1983) (stating that a chapter 11 debtor does not need to commence a turnover action to recover property seized before the bankruptcy filing because such property is property of the estate, and section 542 is self–executing in this scenario), *infra* notes 62–87 and accompanying text. The commencement of an adversary proceeding to recover property may be referred herein as a "turnover action." A chapter 13 debtor is allowed to commence a turnover action to recover property, but there is a current split as to whether such debtor may avail itself to automatic turnover of estate property (without commencing a turnover action) provided under *Whiting Pools*. *See infra* notes 62–87 and accompanying text.

[48] *See generally* Sydney G. Platzer & Son K. Le, *When is a Secured Creditor Entitled to Adequate Protection? An Emerging Trend*, 24 AM. BANKR. INST. J. 50, at 50 (May 2005) (stating that "[t]he very heart of the concept of adequate protection is

can be seen with a mortgage, where the financer agrees to lend money for the debtor to purchase a home, and in return receives a security interest allowing it to take possession of and sell the property upon default. Should the debtor default on the mortgage and then subsequently file for bankruptcy, the automatic stay (as discussed later) would prevent the immediate sale of the property.[49] If the bankruptcy filing occurred during a bearish real estate market, the value of the home (as collateral) decreases each day the foreclosure sale is stalled by the bankruptcy, thereby decreasing the amount of the secured claim to be paid over the course of a Chapter 13 plan.[50]

In that scenario, the mortgagor would seek adequate protection of its interest under section 363(e), which provides:

> [A]t any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.[51]

The words of the statute make clear that it is the creditor's burden to request for adequate protection.[52] If such request is made, the debtor must provide adequate protection of the concerned creditor's interest in order to use the collateral at issue during the plan term.[53] Section 361 outlines the available methods to provide for adequate protection,

to assure the secured creditor that as the bankruptcy procedures unfold he will not be faced with a decrease in value of his collateral.").

[49] *See infra* notes 56-63 and accompanying text.

[50] *See supra* notes 19–37 and accompanying text.

[51] 11 U.S.C. § 363(e).

[52] *See* 11 U.S.C. § 363(e) (stating that adequate protection is available at any time "*on request* of an entity that has an interest in property . . . ") (emphasis added).

[53] In order to cramdown the plan over the objection of a secured creditor, the plan must provide for adequate protection of that creditor's interest in the form of payments over the plan period. *See* 11 U.S.C. 1325(a)(5)(b)(iii)(II).

which include cash payments over the course of a plan or providing a replacement lien.[54]

D. Whiting Pools – Putting them Together

In *United States v. Whiting Pools*, the Supreme Court utilized the foregoing when it examined whether section 542 authorized the turnover of a Chapter 11 debtor's property that was repossessed prior the bankruptcy filing.[55] In *Whiting Pools*, the IRS seized certain equipment the debtor used in the course of its business, and in response, the debtor filed for Chapter 11 bankruptcy relief.[56] Seeking to use the seized equipment in the reorganization of its business, the debtor then brought a turnover action to have the IRS return the property.[57]

The Court held that the repossessed property constituted property of the estate and was subject to turnover on a self–executing basis under section 542(a).[58] Though the debtor did not have a possessory interest in the property at the time of filing, the Court noted that the debtor had an equitable interest in the property, and such interest was unquestionably property of the estate.[59] In order to promote the furtherance of the debtor's reorganization efforts,[60] the Court reasoned that section 542(a) effectively works to return the lost possessory interest in the property to the debtor in order to use the property for the

[54] 11 U.S.C. § 361.

[55] United States v. Whiting Pools, Inc., 462 U.S. 198, 200–01 (1983).

[56] *Id.* at 199 – 200. The IRS levied on the property pursuant to a federal tax lien.

[57] *Id.*

[58] *Id.* at 204.

[59] *Id.* at 203 (citing 11 U.S.C. 541(a)).

[60] *See id.* at 200 (noting that the "going–concern' value [the value of the property in the use of the debtor's business] of the seized property was over four times the amount of the liqudation value).

benefit of the estate.[61] Though the IRS was effectively forced to give up possession in compliance with the turnover provision, the Court went on to note that it may seek adequate protection of its interest once the estate retained the seized property.[62]

THE AUTOMATIC STAY

The automatic stay is perhaps the most important consequence of filing for bankruptcy. Immediately upon the commencement of a bankruptcy case, section 362 of the Bankruptcy Code enjoins creditors from taking a variety of informal and formal actions by creditors to collect on their debts against the debtor.[63]

The stay serves two essential purposes. First, it gives the debtor a "breathing spell" against harassment from creditors seeking to collect on their debts.[64] Second, it bars the inevitable "race to the debtor's assets"—where the creditors flock to the courts to obtain judgment liens—in order to place all creditors on a level playing field.[65] Because these purposes are unquestionably important to the collective nature of

[61] *Id.* at 203–205. The Court utilized Congressional reports to note the broad scope of the bankruptcy estate under 541(a)(1).

[62] *Id.* at 203–204 (noting that Congress chose to include secured property in the estate and to provide adequate protection to those who seek it); *see also id.* at 204 (stating that secured creditors must utilize adequate protection, "rather than the nonbankruptcy remedy of possession.").

[63] 11 U.S.C. § 362(a).

[64] H.R. REP. NO. 95–595, at 340 (1977) ("It gives the debtor a breathing spell from its creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to . . . be relieved of financial pressures that drove him into bankruptcy."); *see also* Dean v. TransWorld Airlines, Inc., 72 F.3d 754, 755 (9th Cir. 1995) (recognizing same).

[65] *See, e.g.*, In re Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982) (stating that the automatic stay protects "what remains of the debtor's insolvent estate and provides a systematic equitable liquidation procedure for all creditors . . . thereby preventing a chaotic and uncontrolled scramble for the debtor's assets")

bankruptcy, creditors who violate the automatic stay may be punished with contempt sanctions.[66]

The stay under section 362(a) lists eight types of prohibited creditor conduct.[67] Part A of this section takes a close look at section 362(a), emphasizing section 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" by a creditor.[68] Part B then discusses 362(b), which outlines the exceptions to the stay, emphasizing section 362(b)(3).

A. Section 362(a)(3)

Section 362(a)(3) prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise

[66] 11 U.S.C. § 362(k).

[67] The stay prohibits: (1) "the commencement or continuation . . . of a judicial, administrative, or other action against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title"; (2) "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title"; (3) "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"; (4) "any act to create, perfect, or enforce any lien against property of the estate"; (5) "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title"; (6) "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title"; (7) "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor"; and (8) "the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title." 11 U.S.C. § 362(a)(1-8).

[68] 11 U.S.C. § 362(a)(3).

control over property of the estate."[69] Prior to 1984, section 362(a)(3) applied to stay "any act to obtain possession of property of the estate or of property of the estate,"[70] and so only prohibited seizing the debtor's property after the bankruptcy case commenced. The Bankruptcy Amendments and Federal Judgeship Act of 1984 amended the provision to apply to any act to "exercise control over property of the estate."[71]

In light of *Whiting Pools*, courts have pondered whether the 1984 amendment represented Congress's tacit approval of the decision, which has since lead to the position that sections 362(a)(3) and 542(a) collectively place an affirmative obligation on creditor to turn over seized estate property upon the filing of a petition.[72] Courts are currently split as to whether this "passive retention" is an act to exercise control over such property, thus constituting a violation of the automatic stay, with a slight majority finding in the affirmative.[73]

1. The Majority View

The Second,[74] Seventh,[75] Eighth,[76] and Ninth Circuits[77] compose the majority interpretation that section 362(a)(3) works collectively

[69] *Id.*

[70] *See* Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3)—One More Time*, 38 NO. 7 BANKR. L. LETTER NL 1 (2018) (hereinafter "Wedoff") (discussing the history of section 362(a)(3)).

[71] *Id.* (citing Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984)).

[72] *See* Wedoff, *supra* note 64; *see also* In re Javens, 107 F.3d 359, 368 (6th Cir. 1997) (surveying courts).

[73] *Compare* Weber v. SEFCU (*In re Weber*), 719 F.3d 72, 81 (2d Cir. 2013), Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 703 (7th Cir. 2009), Cal. Emp't Dev. Dept. v. Taxel (*In re Del Mission Ltd.*), 98 F.3d 1147, 1151 (9th Cir. 1996), *and* Knaus v. Concordia Lumber Co. (*In re Knaus*), 889 F.2d 773, 775 (8th Cir. 1989) *with* In re Denby–Peterson, 941 F.3d 115, 119 (3d Cir. 2019), In re Cowen, 849 F.3d 943, 949 (10th Cir. 2017), *and* United States v. Inslaw, 932 F.2d 1467, 1474 (D.C. Cir. 1991).

[74] Weber, 719 F.3d at 81.

with section 542(a) to require the turnover of repossessed collateral upon the bankruptcy filing. These circuits prioritize reading section 362(a) in accordance with two important policy goals of the Bankruptcy Code—to maximize the value of the bankruptcy estate for the benefit of all creditors and minimize the costs of the estate.[78]

The Seventh Circuit decided this question as a matter of first impression in *Thompson v. General Motors Acceptance Corp.*[79] In *Thompson*, the debtor purchased a vehicle under an installment contract that granted a purchase money security interest (a "PMSI")[80] in the car to a car dealership.[81] The dealership repossessed the car after the debtor defaulted on his payments and, in response, the debtor filed for chapter 13 relief.[82] Now in bankruptcy, the debtor requested that the creditor return the vehicle to him.[83] After the dealership refused to

[75] *Thompso*n, 566 F.3d at 703; *see also* In re Fulton, 926 F.3d 916, 920 (7th Cir. 2019) (declining to overrule *Thompson*).

[76] *Knaus*, 889 F.2d at 775.

[77] *Taxel*, 98 F.3d at 1151.

[78] *See Thompson*, 566 F.3d at 702 (stating that an "asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than sitting idle on a creditor's lot."); *see also Weber*, 719 F.3d at 81 (citing *Thompson*), *Taxel*, 98 F.3d at 1151–52 (noting that to hold otherwise and require a debtor to commence a turnover action to recover property "rightfully due to a bankruptcy estate is a very real concern."), *Knaus*, 889 F.2d at 775 (stating that the other creditors in the bankruptcy should not have the financial burden associated with a turnover action of property that rightfully belongs to the estate).

[79] 566 F.3d 699.

[80] A purchase money security interest is a security interest where the purchased goods serve as collateral that secures for the purchaser's (or the debtor's) obligation to pay for such goods. U.C.C. § 9–103 (AM. LAW INST. & UNIF. LAW COMM'N 2000). An installment contract is a common example. The dealership sells the car on credit to the purchaser, and in consideration, the dealership is granted a security interest in the car to secure the purchaser's obligation to make payments on the vehicle. For a general background on consensual security interests, *see generally supra* notes 10–23 and accompanying text.

[81] *Thompson*, 566 F.3d at 700–01.

[82] *Id.* at 701.

[83] *Id.*

turn over the car back to the debtor, the debtor moved for sanctions.[84] The bankruptcy court denied the motion, and the debtor directly appealed to the Seventh Circuit.[85]

The court began its analysis by noting the similarity of issues presented in *Whiting Pools*. Though *Whiting Pools* solely focused on Chapter 11 cases,[86] the Seventh Circuit recognized that the purposes of Chapter 11 and Chapter 13 bankruptcy are roughly the same—to allow the debtor to reorganize his affairs while simultaneously addressing his debts.[87] Because *Whiting Pools* held that section 542(a) effectively grants the estate a possessory interest in seized property, the court found that the same rationale should apply to chapter 13 cases, and thus held that the turnover provision compelled the dealership to return the car to the estate.[88]

With the turnover issue settled, the court then pondered whether knowingly retaining assets subject to the turnover provision could

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[84] *Id.*

[85] *Id.* Appeals from the bankruptcy courts are normally heard by the district court. *See* 28 U.S.C. § 158(a) (2010). However, if the appeal is a question of law for which there is no controlling precedent, either the bankruptcy court or a party at interest may request that the appeal be heard directly by the circuit court of appeals. *See* 28 U.S.C. § 158(d)(2)(B)(i) (the bankruptcy court may ask for a direct appeal under certain circumstances found under 28 U.S.C. § 158(d)(2)(A)(i), one of which being that "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals . . . .").

[86] *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 211 (1983) (the Supreme Court solely discussed the purpose of chapter 11 bankruptcy); *see also supra* notes 45–52 and accompanying text.

[87] *See Thompson*, 566 F.3d at 702 ("The primary goal of reorganization bankruptcy is to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property seized pre-petition.") (referencing United States v. Whiting Pools, Inc., 462 U.S. 198, 203–204 (1983)); *see also id.* at 705 ("The principle behind Chapter 11 and Chapter 13 is the same – allow the debtor to reorganize and repay the majority of his debts without having to liquidate his assets.").

[88] *Id.* at 703–704.

violate the automatic stay.[89] The court looked at the plain language of section 362(a), specifically at what it means to "exercise control" over an asset.[90] The court consulted the dictionary definition of control: "to exercise restraining or directing influence over" or "to have power over."[91] Noting that "[h]olding on to a debtor's asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition," the court reasoned that the passive retention of a seized asset is an act to exercise control over property of the estate under section 362(a)(3).[92]

2. The Minority View

On the other hand, the Third, Tenth, and D.C. Circuits all compose the minority view that section 362(a)(3) does not prohibit passively retaining an asset belonging to the estate.[93] The minority position places emphasis on the literal interpretation of the word "act" as it appears in the statute to hold that the automatic stay only prohibits affirmative acts to exercise control over estate property.[94] That rationale also leads these courts to determine that a creditor is not affirmatively obligated to turn over such property.[95]

Shortly after *Fulton* was decided, the Third Circuit joined the minority approach in *In re Denby-Peterson*, a case with almost

[89] *Thompson*, 566 F.3d at 704.

[90] *Id.* at 702.

[91] *Id.* (quoting *Control*, MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th Ed. 2003) (internal quotation marks omitted)).

[92] *Id.*

[93] In re Denby–Peterson, 941 F.3d 115, 119 (3d Cir. 2019), In re Cowen, 849 F.3d 943, 949 (10th Cir. 2017)

[94] *See Denby–Peterson*, 941 F.3d at 124–125 (consulting the dictionary to define an "act" as, generally "something done") (internal citations and quotation marks omitted); *see also Cowen*, 849 F.2d at 949 (using the dictionary to reason that section 362(a)(3) "stays entities from *doing* something to obtain possession of or control over the estate's property.") (emphasis in original).

[95] *See, e.g.*, *Cowen*, 849 F.2d at 949 ("Stay means stay, not go.").

identical facts to those in *Thompson*.[96] The Third Circuit first examined, as did the Tenth Circuit, whether passively retaining an asset constitutes an "act" under section 362(a)(3).[97] After consulting the dictionary, the court concluded that in order for there to be an "act[,]" in violation of the stay, such act must be an "affirmative act to exercise control over property of the estate."[98] In so doing, the court rejected the legislative history arguments presented in *Fulton*, noting that Congress did not express any intent to include passive acts within the automatic stay's scope.[99]

Finally, the Third Circuit then declined to read section 362(a)(3) in conjunction with section 542(a), instead outlining a three-step method for a debtor to seek turnover of seized property.[100] The court stated that all actions to recover property must be brought under an adversary proceeding in accordance with the Federal Rules of Bankruptcy Procedure, and that turnover actions are not exempt from this requirement.[101] The court then noted that if a debtor could force

[96] *Compare Denby-Peterson*, 941 F.3d at 119–20 *with* Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 701 (7th Cir. 2009).

[97] *Denby-Peterson*, 941 F.3d at 125; *see also Cowen*, 849 F.2d at 949.

[98] *Denby-Peterson*, 941 F.3d at 125–26 (citing *Cowen*, 849 F.2d at 949, United States v. Inslaw, 932 F.2d 1467, 1474 (D.C. Cir. 1991)).

[99] *Id.* at 127 (stating that the "legislative history fails to shed light on Congress's intent behind the 1984 edition of the 'exercise control over property of the estate' clause."); *but see* In re Fulton, 926 F.3d 916, 923 (7th Cir. 2019) (declining to overrule *Thompson* and reiterating that the 1984 amendment "suggested congressional intent to make the stay more inclusive by including conduct of 'creditors who seized an asset prepetition.'") (quoting *Thompson*, 566 F.3d at 702 (citation omitted)).

[100] *See id.* at 131 (outlining a framework for recovering seized property as: "(1) the Chapter 13 debtor must seek court relief, such as by initiating an adversary proceeding requesting turnover; (2) the Bankruptcy Court then determines whether property is subject to turnover; and (3) if it is, in accordance with that determination, the Bankruptcy Court issues a court order compelling a creditor to turn over property to the debtor.").

[101] *Id.* at 129 (stating that all turnover under 542(a) is an action to recover property under the Bankruptcy Rules) (referencing FED. R. BANKR. P. 7001(1)); *see also* In re Cowen, 849 F.2d 943, 950 (10th Cir. 2017) ("[T]here is still no link

the immediate turnover of seized property, it would temporarily suspend any applicable affirmative defense to the turnover proceeding, such as claiming that the seized property was not property of the estate.[102] Further, the court examined the Supreme Court's holding in *Citizens Bank of Maryland v. Strumpf*,[103] which held that a bank-creditor's failure to turnover a debt owed to the debtor upon demand under section 542(b) was not a violation of the stay.[104] Leaning on *Strumpf*, the Tenth Circuit became unconvinced that section 542(a)'s text necessarily demanded the return of property seized prepetition.[105]

B. Section 362(b)(3)

Section 362(b) outlines several enumerated exceptions to the automatic stay.[106] Pertinent here is section 362(b)(3), which excludes

between [section] 542 and [section] 362."); *but see Thompson*, 566 F.3d at 711 (using section 362(a)(3) in conjunction with section 542(a) to find that turnover of estate property is self-executing), Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1151–52 (9th Cir. 1996) (requiring debtors to prosecute a turnover action in order to recover property "rightfully due to a bankruptcy estate is a very real concern."), Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (stating that other creditors in the bankruptcy should not have the financial burden associated with a turnover action of property that rightfully belongs to the estate).

[102] *Id.* at 129–30.

[103] 516 U.S. 16, 21 (1995).

[104] *See Denby-Peterson*, 941 F.3d at 131 (discussing *Strumpf*). Section 542(b) provides that "an entity that owes a debt that is property of the estate . . . shall pay such debt to, or on the order of, the trustee . . . ." 11 U.S.C. § 542(b). *Strumpf* held that section 542(b) did not command a bank-creditor to turn over a debt it owed to the debtor so as to preserve the bank's right to setoff under section 553. 516 U.S. at 21.

[105] *Id.* (using *Strumpf*'s holding that section 542(b) did not mandate a for the proposition that "shall deliver" in section 542(a) does not command a creditor to deliver seized property)

[106] *See* 11 U.S.C. § 362(b)(1)-(8). Other exceptions to the stay worth mentioning include: criminal actions against the debtor; certain actions to determine domestic support liability; government acts to enforce a judgment, other than a

from the stay certain post-petition actions to perfect or to maintain or continue the perfection of a prepetition interest in property.[107] The exception applies to the holders of unperfected security interests where applicable state law allows such interest holders to perfect their liens or interests as of an effective date that is earlier than the date of perfection, or "retroactive perfection."[108]

The purpose and significance of the exception is best understood by addressing its scope. The exception is limited by its companioning provision, section 546(b), to apply only where the trustee would be able to eradicate or "avoid" an unperfected security interest under its "strong arm" powers under section 544(a).[109] For example, suppose a creditor enters into a security agreement with a debtor, pursuant to the laws of a state adopting UCC Article 9, granting the creditor a lien on some of the debtor's property.[110] Shortly thereafter, the debtor then files for bankruptcy before the creditor is able to file the necessary financing statement to perfect its lien. The trustee would be able to eliminate or "avoid" this lien pursuant to section 544, which grants it the power to avoid unperfected security interests.[111] Section 362(b)(3),

money judgment, pursuant to a relevant police power; and certain actions to offset a debts between a creditor and a debtor.

[107] 11 U.S.C. § 362(b)(3).

[108] S. REP. NO. 95–989, at 86–87 (1978). For more background on perfection, *see generally* Irve J. Goldman, *The Effect of Bankruptcy on a Prejudgment Attachment Lien*, 33 AM. BANKR. INST. J. 32, 32 (2014). A lien represents right against property, and property rights are determined by state law. Butner v. United States, 440 U.S. 48, 55 (1979).

[109] *See* 11 U.S.C. § 362(b)(3) (stating the exception applies to maintain perfection "*to the extent* that the trustee's rights and powers are subject to such perfection under section 546(b) . . . .") (emphasis added). Section 546(b) provides that the trustee's avoidance power under section 544 is subject to applicable law that permits retroactive perfection or retroactive maintenance of perfection. 11 U.S.C. § 546(b).

[110] For background, *see generally supra* notes 10–23 and accompanying text.

[111] *See* 11 U.S.C. § 544(a). Upon the bankruptcy filing, the trustee is empowered with the rights of a judicial lien creditor against all estate property. *Id.* Under U.C.C. Article 9, an unperfected security interest is subordinate to the interest

therefore, allows for the creditor to file a financing statement (or other method to perfect) its interest notwithstanding the bankruptcy, so as to protect its interest against the trustee's avoidance power.[112]

C. In re Fulton

In 2017, Chicago–native Robbin Fulton purchased a new car in order to transport her young child and care for her parents on weekends.[113] Three weeks later, the City impounded the car for an outstanding citation of driving on a suspended license.[114] Fulton then filed for Chapter 13 bankruptcy relief in the Northern District of Illinois one month later.[115]

Shortly after the bankruptcy court approved her Chapter 13 plan, Fulton requested that the City return her vehicle.[116] The City refused to comply with the request and instead responded by amending its proof of claim to include impound fees and assert a security interest in the

of a competing judicial lien creditor with respect to collateral. U.C.C. § 9–103 (AM. LAW INST. & UNIF. LAW COMM'N 2000). Therefore, the Bankruptcy Code grants the avoidance power, while the U.C.C., a state law, determines the priority. For a greater background on avoidance powers, *see generally* Richard J. Mason, Patricia K. Smoots, *When Do the Creditors' Shoes Fit?: A Bankruptcy Estate's Power to Assert the Rights of a Hypothetical Judgment Creditor*, 91 AM. BANKR. L.J. 435 (2017).

[112] *See generally id.* Without section 362(b)(3), perfecting an interest on estate property during the bankruptcy would be a violation of the automatic stay. *See* 11 U.S.C. § 362(a)(3) (the automatic stay prohibits "any act to create, perfect, or enforce any lien against property of the estate"); *see also* 11 U.S.C. § 362(a)(4) (also prohibiting "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of [the bankruptcy case].").

[113] In re Fulton, 926 F.3d 916, 920–21 (7th Cir. 2019).

[114] *Id.* at 921.

[115] In re Fulton, No. 18 BK 02860, 2018 WL 2570109, at *1 (Bankr. N.D. Ill. May 31, 2018), *aff'd*, 926 F.3d 916 (7th Cir. 2019).

[116] *Id.* at *2.

car.[117] Fulton then moved for sanctions against the City for violating the automatic stay pursuant to 11 U.S.C. § 362(k) on the grounds that *Thompson* required the City to turn the vehicle over to her.[118]

The bankruptcy court granted Fulton's motion and required the City to turn over Fulton's car within one day.[119] One week later, the court denied the City's motion for a stay pending appeal.[120] The City then appealed to the Seventh Circuit, which consolidated its appeal with three other appeals from cases with similar facts.[121]

In *Fulton*, the City presented three grounds for appeal. First, the City argued that *Thompson* was wrongly decided and should be overruled for two reasons—passively retaining the seized cars was not an "act" to exercise control over estate property under section 362(a)(3), and even if it were, the City contended that it was not obliged to turn the vehicles over until their owners filed adversary proceedings and provided adequate protection for the City's interest.[122] Second, the City argued that even if *Thompson* controlled, retention of the vehicles was necessary to maintain perfection of its security interests and is so exempted from the stay under section 362(b)(3).[123] Last, the City alternatively asserted that it was exempted under section

[117] *Id.* The City asserted a possessory lien with respect to Fulton's car pursuant to the Chicago Municipal Code. *See generally* notes 1–8 and accompanying text.

[118] *Id.*

[119] *Id.* at *8. Judge Schmetterer actually found that Municipal Code § 9–92–080 did not grant the City a valid possessory interest over Fulton's car because the ordinance exceeds Chicago's authority as a home-rule body. *See id.* at 5–6 (referencing In re Howard, 584 B.R. 252 (Bankr. N.D. Ill. 2018)). This matter is beyond the scope of this article.

[120] In re Fulton, 588 B.R. 834, 835 (Bankr. N.D. Ill. 2018).

[121] In re Fulton, 926 F.3d 916, 920 (7th Cir. 2019); *see also* In re Howard, 584 B.R. 252 (Bankr. N.D. Ill. 2018); In re Peake, 588 B.R. 811 (Bankr. N.D. Ill. 2018); In re Shannon, 590 B.R. 467 (Bankr. N.D. Ill. 2018).

[122] *Fulton*, 926 F.3d at 922.

[123] *Id.* at 927.

362(b)(4), because it retained the vehicles in an effort to enforce its police power.[124]

Turning to the City's first argument, the court quickly declined to overrule *Thompson*, citing that the City gave no argument that was not considered and subsequently rejected by the *Thompson* court.[125] The court similarly restated the policy interests served by the Bankruptcy Code, noting that "the breathing room given to a debtor that attempts to make a fresh start, and the equality of distribution of assets among similarly situated creditors according to the priorities set forth within the Code."[126] Notably, the court reaffirmed that its interpretation of section 362(a)(3) was aligned with the majority view.[127]

On the City's second argument, the Seventh Circuit agreed with the lower courts in finding that the City's passive retention practice was not excepted under section 362(b)(3).[128] In so doing, the court looked closely at the interplay of section 362(b)(3) and section 546(b), explaining that "the purpose of these sections is to prevent creditors from losing their lien rights because of the bankruptcy; they do not permit creditors to retain possession of debtors' property."[129] The court then rejected the City's argument that it must retain possession of the vehicles to maintain perfection of its purported liens.[130] The court reasoned that it was not necessary for the City to maintain possession of the vehicles to remain a secured creditor because it could have otherwise filed a financing statement with the Illinois Secretary of State, thereby giving constructive notice of its "possessory lien" or

[124] *Id.*

[125] *Id.* at 924–925.

[126] *Id.* at 925 (quoting 5 COLLIER ON BANKRUPTCY, ¶ 541.01 (16th ed. 2019)).

[127] *Fulton* was decided less than two years following the Tenth Circuit's decision in In re Cowen.

[128] *Fulton*, 926 F.3d at 929.

[129] *Id.* at 928.

[130] *Id.*

security interest in the debtor's property.[131] Additionally, the court rejected the argument that the City's forced compliance with the automatic stay would terminate its claimed interest.[132] In so doing, the court utilized Illinois common law to determine that involuntary loss of possession does not extinguish a possessory lien.[133]

Last, the court found that the City was not exempt under section 362(b)(4).[134] The court first examined the City's retention practice under the pecuniary purpose test, asking whether the City's impound laws were "designed to further the safety and welfare of Chicago residents" and that the City only receives an "ancillary pecuniary benefit" in the process.[135] The court answered in the negative, reasoning that by retaining the vehicles until the traffic debt was paid in full, the City was attempting to position itself ahead of other creditors and subvert the bankruptcy process.[136] The court then found that the impound laws also violate the public policy test.[137] The court stated that parking tickets and minor moving violations do not implicate traditional police power regulations, which typically implicate public health and environmental concerns.[138] Rather, the court importantly pointed out the City's heavy reliance on collecting parking and traffic tickets as a revenue gaining measure.[139]

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[131] *Id.*

[132] *Id.* at 928–29.

[133] *Id.* (referencing In re Estate of Miller, 197 Ill. App. 3d 67, 72 (1990) ("The law respecting common law retaining liens is that the involuntary relinquishment of retained property pursuant to a court order does not result in the loss of the lien.")).

[134] *Id.* at 931.

[135] *Id.* at 929–30 (quotations in original).

[136] *Id.*

[137] *Id.* at 931.

[138] *Id.*

[139] *Id.*

DISCUSSION

Overall, the Seventh Circuit decided *Fulton* correctly, given the precedent set forth in *Thompson* and understanding the purpose and policy goals of chapter 13 bankruptcy.

First, *Fulton* reaffirms the Seventh Circuit's understanding of the purpose of Chapter 13 bankruptcy—it operates for the benefit of all by allowing for the debtor to reorganize his affairs and utilize post-petition income to pay his preexisting debts.[140] A Chapter 13 debtor is a fiduciary to the creditors of the bankruptcy estate, and he must be able to utilize his estate property, including his car, for the benefit of all. He cannot do so if the City is allowed to prefer itself by demanding payment ahead of everyone else.[141]

Further illustrative here is that the Seventh Circuit, along with the rest of the majority, understood the importance of both maximizing the estate and minimizing its expenses. Looking at the former, a car is an unquestionably important means of transportation for Chicagoans who may commute to and from work. If the City were allowed to retain the vehicles during the early stages of the bankruptcy process, these debtors would have interim difficulties getting to work and earning income used to pay off their debt in a payment plan. Without reliable post-petition income, any hope of reorganization is lost, as the bankruptcy would ultimately be dismissed.[142] Therefore, the debtors are not the only party in reliance their own income—the other creditors are as well.

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[140] *See supra* notes 39–42 and accompanying text.

[141] *See* In re Fulton, 926 F.3d 916, 931 (7th Cir. 2019) ("[T]he City needs to satisfy the debts owed to it through the bankruptcy process, as do all other creditors.").

[142] *See* 11 U.S.C. § 1307(c)(6) (providing that cases can be dismissed for material default).

Second, should the debtor be forced to commence an adversary proceeding to recover his car, it would either severely delay the return of property rightfully belonging to the estate, or even worse, place pressure on the debtor to pay the City immediately—a result abhorrent to the purpose of the automatic stay.[143] To hold otherwise would be condoning the City's practice of preferring itself to all other creditors to the bankruptcy estate.

Despite the minority view's criticism,[144] *Fulton*'s interpretation of section 362(a)(3) also preserves the text of its companion provisions—section 542(a) and section 363(e). If a creditor could lawfully retain possession of estate property in spite of the automatic stay, such creditor's burden to seek adequate protection, as imposed under 363(e), becomes rather meaningless.[145] Conversely, by requiring a creditor to return seized property upon the bankruptcy filing, the burden to seek adequate protection remains with the creditor, just as *Whiting Pools* stated.[146]

Though not quite as pressing as the section 362(a)(3) issue, it is also worth noting that the Seventh Circuit correctly examined the nature of the exception under section 362(b)(3). The City does not need to retain possession to maintain a security interest in the immobilized vehicles, because the trustee cannot avoid the interest

[143] *See supra* notes 63–66 and accompanying text.

[144] *See, e.g.*, In re Cowen, 849 F.3d 943, 949 (criticizing the majority view's use of policy arguments and legislative history while simultaneously abstaining from "faithful adherence to the text.").

[145] Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 704 (7th Cir. 2009)

[146] *See supra* notes 47-61 and accompanying text.

under Illinois law.[147] The City instead could also can seek a replacement lien to adequately protect its interests.[148]

CONCLUSION

Chapter 13 bankruptcy relief relies heavily on equitable principles in order to promote a fair and efficient reorganization of a debtor's affairs. Section 362(a)(3) works in furtherance of this goal by maximizing the bankruptcy estate's value and minimizing its burdens. The Seventh Circuit correctly identified the foregoing in *Fulton*, and the Supreme Court should follow suit.

[147] *See supra* notes 105–111 and accompanying text. *See also* In re Estate of Miller, 197 Ill. App. 3d 67, 72 (1990) ("The law respecting common law retaining liens is that the involuntary relinquishment of retained property pursuant to a court order does not result in the loss of the lien.")

[148] 11 U.S.C. § 361; *see also* In re Fulton, 926 F.3d 916, 929 (7th Cir. 2019).